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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 KLINKITAT COUNTY, a  
8 political subdivision of the State of  
9 Washington,

10 Plaintiff,

11 vs.

12 U.S. DEPARTMENT OF THE  
13 INTERIOR; SALLY JEWELL, in  
14 her official capacity as Secretary of  
15 the Interior; LAWRENCE  
16 ROBERTS, in his official capacity as  
17 Acting Assistant Secretary-Indian  
18 Affairs; STANLEY M. SPEAKS, in  
19 his official capacity as Regional  
20 Director, Bureau of Indian Affairs,

21 Defendants.

No. 1:16-CV-03060-LRS

**ORDER GRANTING  
MOTION TO DISMISS**

22 **BEFORE THE COURT** is Defendants' Motion To Dismiss (ECF No. 9).

23 This motion was heard with telephonic oral argument on August 25, 2016. Steven  
24 Miskinis, Esq., argued for Defendants. Jeremy R. Larson, Esq., argued for  
25 Plaintiff.  
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27 **I. BACKGROUND**

28 Klickitat County brings this lawsuit against the U.S. Department of Interior  
(DOI) and the Bureau of Indian Affairs (BIA), and various officials of those two

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1 agencies, seeking declaratory and injunctive relief.<sup>1</sup> In its Complaint, Klickitat  
2 County states that it “brings this action to resolve an active dispute between local  
3 and federal officials concerning the exercise of civil and criminal jurisdiction  
4 within ‘Tract D,’ an area consisting of approximately 99,000 acres in Glenwood,  
5 Washington abutting the Yakama Reservation.” (ECF No. 1 at Paragraph 1.2).

6 On July 17, 2012, the Yakama Nation filed a petition with the State of  
7 Washington asking the State to partially retrocede its civil and criminal  
8 jurisdiction over “all Yakama Nation Indian country.” This was jurisdiction the  
9 State had previously obtained from the federal government pursuant to what is  
10 known as Public Law 280. Pub. L. 83-280, 67 Stat. 588, 588-89 (1953). On  
11 January 17, 2014, Washington Governor Jay Inslee, by Proclamation 14-01,  
12 agreed to retrocede certain aspects of State jurisdiction “[w]ithin the exterior  
13 boundaries of the Yakama Reservation” and not “outside the exterior boundaries  
14 of the Yakama Reservation.”<sup>2</sup> (ECF No. 1-3).

15 In April 2015, Klickitat County sent a letter to DOI asking that it  
16 “specifically exclude the area known as Tract D” from any acceptance of  
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18 <sup>1</sup> BIA is an agency within DOI. Defendants are collectively referred to as  
19 “DOI” in this order.

20 <sup>2</sup> The State retroceded full civil and criminal jurisdiction in the areas of  
21 compulsory school attendance, public assistance, domestic relations and juvenile  
22 delinquency; jurisdiction over operation of motor vehicles on public roads except  
23 where the civil cause of action or criminal offense involves “non-Indian plaintiffs  
24 [or] non-Indian defendants, and non-Indian victims;” and criminal jurisdiction  
25 over all other offenses except when they involve “non-Indian defendants and non-  
26 Indian victims.”

1 retroceded jurisdiction in order to avoid any claim by the Yakama Nation to civil  
2 and criminal jurisdiction within Tract D. This request was not answered. (ECF  
3 No. 1 at Paragraph 1.7 and ECF No. 1-4).

4 By letter dated October 19, 2015, DOI formally accepted the State's partial  
5 retrocession of jurisdiction "pursuant to 25 U.S.C. § 1323 and authority vested in  
6 the Secretary of Interior by Executive Order No. 11435 of November 21, 1968, 33  
7 Fed. Reg. 17339, and delegated to the Assistant Secretary-Indian Affairs."<sup>3</sup> Tract  
8 D was not specifically mentioned in the letter, but Kevin Washburn, then Assistant  
9 Secretary of Indian Affairs, wrote:

10 On April 30, 2015, I met with the Governor's General  
11 Counsel to discuss retrocession. An issue that has been  
12 highlighted in several meetings is related to reservation  
13 boundaries. We have assured anyone who has asked that  
14 this process is not a mechanism for redrawing reservation  
15 boundaries. The scope of the Yakama Nation's territorial  
jurisdiction will be governed by Federal law. The decision  
before my Office is nothing more than an acceptance of the  
State's request for retrocession. As explained to the Governor's  
office, this decision is not intended to affect the boundaries

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16 <sup>3</sup> 25 U.S.C. § 1323(a) provides: "The United States is authorized to accept a  
17 retrocession by any State of all or any measure of the criminal or civil jurisdiction,  
18 or both, acquired by such State pursuant to the provisions of section 1162 of Title  
19 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat.  
20 588), as was in effect prior to its repeal by subsection (b) of this section."

21 Executive Order No. 11435 provides the Secretary of the Interior with the  
22 discretion to accept retrocession and imposes two requirements: 1) acceptance of  
23 retrocession is effected through publication in the Federal Register with such  
24 notice specifying "the jurisdiction retroceded and the effective date of the  
25 retrocession" and 2) where criminal jurisdiction is retroceded, acceptance may  
26 occur "only after consultation by the Secretary with the Attorney General."

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1 of the reservation in any way. As noted above, this decision  
2 does not expand tribal jurisdiction; it merely eliminates State  
authority over certain offenses on the reservation.

3 (ECF No. 1-5 at p. 4).

4 Notice of the partial retrocession was published in the Federal Register on  
5 October 20, 2015, indicating “[c]omplete implementation of jurisdiction will be  
6 effective April 19, 2016.” (ECF No. 1-6).

7 Klickitat County filed this lawsuit on April 18, 2016, seeking a judgment  
8 declaring that DOI violated the Administrative Procedure Act (APA), 5 U.S.C. §  
9 706, by: (1) refusing to address whether the State intended to retrocede jurisdiction  
10 over Tract D; (2) failing to acknowledge or otherwise address Klickitat County’s  
11 request that Tract D be specifically excluded from any acceptance of retroceded  
12 jurisdiction; (3) refusing to decide the issue of whether acceptance covered Tract  
13 D; and (4) leaving it to the courts to provide a “definitive interpretation” of their  
14 agency action.<sup>4</sup> (ECF No. 1 at Paragraph 1.9).

15 Klickitat County alleges DOI “acted in excess of statutory jurisdiction,  
16 authority, limitations and short of statutory right by not expressly excluding Tract  
17 D from the government’s acceptance of retrocession, thus implicitly assuming  
18 federal jurisdiction over Tract D and approving concurrent tribal jurisdiction  
19 without authority to do so.” (ECF No. 1 at Paragraph 6.5). Because of this  
20 alleged assumption of jurisdiction over Tract D, Klickitat County contends DOI is  
21 “interfering with the County’s lawful assertion of jurisdiction over Tract D.”  
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23 <sup>4</sup> In his October 19, 2015 letter to the Yakama Nation, Kevin Washburn  
24 also wrote: “If a disagreement develops as to the scope of retrocession, we are  
25 confident that courts will provide a definitive interpretation of the plain language  
26 of the Proclamation.” (ECF No. 1-5 at p. 5).

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(ECF No. 1 at Paragraph 6.9). Therefore, in addition to declaratory relief, the County seeks to permanently enjoin DOI from asserting jurisdiction over Tract D.

## **II. DISCUSSION**

### **A. 12(b)(1)- Subject Matter Jurisdiction**

A challenge under the APA constitutes a federal question which provides this court with subject matter jurisdiction pursuant to 28 U.S.C. § 1331. Nevertheless, DOI contests whether Klickitat County has standing and whether its dispute with DOI is ripe for adjudication.

When a Fed. R. Civ. P. 12(b)(1) motion is filed in conjunction with other motions, as is the case here, the court normally considers the Rule 12(b)(1) motion first because doing so prevents a court without subject matter jurisdiction from prematurely dismissing a case with prejudice. While standing and ripeness are appropriate grounds for a 12(b)(1) motion because these requirements limit subject matter jurisdiction, they do not take away from the fact that this court has federal question subject matter jurisdiction. Accordingly, this court is not compelled to address the standing and ripeness issues raised by DOI and may proceed to address the merits without concern that it is dismissing the case prematurely.

DOI advances arguments against standing which actually bleed over into the merits and allege substantive defects in Plaintiff's Complaint that are the subject of DOI's Fed. R. Civ. P. 12(b)(6) motion. For example, DOI asserts that "[p]laintiff here seeks a determination that goes beyond any statutory requirement for retrocession found in 25 U.S.C. § 1323, and alleges standing based on the lack of information in Interior's acceptance of the State's retrocession regarding the status of Tract D." (ECF No. 12 at p. 6)(emphasis added). DOI further asserts that "here, Interior did provide all of the information required by law to justify

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1 acceptance of the State's retrocession . . . ." (ECF No. 12 at pp. 6-7). The  
2 question that goes to the merits and is the subject of DOI's 12(b)(6) motion is  
3 precisely whether DOI provided all of the information it was required by law to  
4 provide in order to accept the State's retrocession.<sup>5</sup>

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6 **B. 12(b)(6)- Failure To State A Claim**

7 A Fed. R. Civ. P. 12(b)(6) dismissal is proper only where there is either a  
8 "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under  
9 a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699  
10 (9th Cir. 1990). In reviewing a 12(b)(6) motion, the court must accept as true all  
11 material allegations in the complaint, as well as reasonable inferences to be drawn  
12 from such allegations. *Mendocino Environmental Center v. Mendocino County*,

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 <sup>5</sup> DOI contends that its "acceptance of the State's partial retrocession of  
15 jurisdiction over the Yakama Nation's Reservation provides Plaintiff no standing  
16 to invoke this Court's subject matter jurisdiction over its boundary dispute with  
17 the Nation." (ECF No. 9 at p. 9). It seems, however, that Plaintiff does have  
18 standing to invoke this court's subject matter jurisdiction over Plaintiff's dispute  
19 with DOI as to whether DOI, as part of its acceptance of retrocession, had a legal  
20 obligation to specify the geographic scope of the jurisdiction retroceded in an  
21 attempt to ascertain whether Plaintiff in fact has a boundary dispute with the  
22 Yakama Nation. As DOI recognizes, that question is distinct from the question of  
23 whether Tract D lies within the Yakima Reservation. The question of whether  
24 DOI properly accepted a partial retrocession of jurisdiction within the exterior  
25 boundaries of the Yakima Reservation is "ripe" for adjudication and is resolved by  
26 this order.

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1 14 F.3d 457, 460 (9th Cir. 1994); *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898  
2 (9th Cir. 1986). The complaint must be construed in the light most favorable to  
3 the plaintiff. *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th  
4 Cir. 1995). The sole issue raised by a 12(b)(6) motion is whether the facts  
5 pleaded, if established, would support a claim for relief; therefore, no matter how  
6 improbable those facts alleged are, they must be accepted as true for purposes of  
7 the motion. *Neitzke v. Williams*, 490 U.S. 319, 326-27, 109 S.Ct. 1827 (1989).  
8 The court need not, however, accept as true conclusory allegations or legal  
9 characterizations, nor need it accept unreasonable inferences or unwarranted  
10 deductions of fact. *In re Stac Electronics Securities Litigation*, 89 F.3d 1399,  
11 1403 (9<sup>th</sup> Cir. 1996). “Factual allegations must be enough to raise a right to relief  
12 above the speculative level . . . on the assumption that all the allegations in the  
13 complaint are true (even if doubtful in fact) . . .” *Bell Atlantic Corporation v.*  
14 *Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007). The factual allegations must  
15 allege a plausible claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1951  
16 (2009).

17 This court concludes the Klickitat County has asserted a new requirement  
18 for DOI to meet before accepting a retrocession of jurisdiction which has no basis  
19 in law. Therefore, Plaintiff’s Complaint fails to allege a cognizable legal theory  
20 and must be dismissed. “Rule 12(b)(6) authorizes a court to dismiss a claim on the  
21 basis of a dispositive issue of law.” *Nietzke*, 490 U.S. at 326. It suffices for DOI  
22 to accept the partial retrocession on the terms on which it was offered- “as  
23 applying within the exterior boundaries of the Yakama Reservation,” whatever  
24 those may be. DOI’s acceptance of that partial retrocession is not an agency  
25 declaration of the Yakama Reservation boundaries.

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1 Under the APA, courts review agency action pursuant to an “arbitrary and  
2 capricious” standard of review. 5 U.S.C. § 706(2). The court can set aside agency  
3 action that is “arbitrary and capricious,” but it “does not empower the district court  
4 to conduct a de novo review of the administrative decision and order the agency to  
5 reach a particular result.” *Mt. St. Helens Min. and Recovery Ltd. P’ship v. United*  
6 *States*, 384 F.3d 721, 727 (9<sup>th</sup> Cir. 2004). Plaintiff points to no statutory or  
7 regulatory obligation requiring a determination of reservation boundaries in the  
8 context of acceptance of retrocession. Furthermore, DOI is not obligated under  
9 25 U.S.C. § 1323(a) to ensure that a State proffer of jurisdiction is valid under  
10 state law. *United States v. Lawrence*, 595 F.2d 1149, 1151 (9<sup>th</sup> Cir. 1979);  
11 *Oliphant v. Schlie*, 544 F.2d 1007 (9<sup>th</sup> Cir. 1976), *reversed on other grounds by*  
12 *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *United States v.*  
13 *Brown*, 334 F. Supp. 536 (D. Neb. 1971); *Omaha Tribe of Neb. v. Village of*  
14 *Walthill*, 334 F. Supp. 823 (D. Neb. 1971), *affirmed* at 460 F.2d 1327 (8<sup>th</sup> Cir.  
15 1972)(per curiam).

16 Plaintiff focuses on the adequacy of the factual allegations in its Complaint  
17 without addressing whether, in the first instance, it has a cognizable legal theory.  
18 In the absence of some legal authority (statutory, regulatory or otherwise)  
19 plausibly suggesting that as part of its acceptance of the State’s partial  
20 retrocession, DOI was obligated to ascertain the precise territorial boundaries of  
21 the Yakama Nation Reservation, the adequacy of the factual allegations in  
22 Plaintiff’s Complaint (for example, regarding actual and potential injury) is  
23 irrelevant.

24 One of the cases cited by Plaintiff, *Amador County v. Salazar*, 640 F.3d 373  
25 (D.C. Cir. 2011), recognizes the critical question under the APA is what is  
26 required by the agency under the applicable statute. Plaintiff does not say what it

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1 is in 25 U.S.C. § 1323 that requires DOI to determine the geographic boundaries  
2 of the Yakama Reservation as part of accepting a retrocession of State jurisdiction  
3 within those boundaries. Plaintiff's Complaint alleges "[t]he Department of  
4 Interior and BIA acted in excess of statutory jurisdiction, authority, limitations and  
5 short of statutory right by not expressly excluding Tract D from the government's  
6 acceptance of the State's retrocession . . ." (ECF No. 1 at 23-24), but does not  
7 specify what "statutory jurisdiction, authority and limitations," and how these  
8 things were purportedly contravened.

9 Plaintiff repeatedly asserts and assumes the retrocession at issue  
10 "increased" and "expanded" federal government jurisdiction. The federal  
11 government, however, merely accepted the return of jurisdiction from the State  
12 which the State has previously acquired from the federal government pursuant to  
13 Public Law 280. Retrocession neither increased or decreased federal jurisdiction  
14 within the exterior boundaries of the Yakama Reservation, including Tract D if it  
15 is within those boundaries. Retrocession simply restored jurisdiction to the  
16 federal government which it previously had. In other words, the federal  
17 government re-assumed its jurisdiction.

18 Plaintiff assumes Tract D is not within the exterior boundaries of the  
19 Yakama Reservation. According to Plaintiff, "because Tract D is not within the  
20 Reservation, Tract D is not subject to retrocession under 25 U.S.C. § 1323 and  
21 Defendants have acted outside their authority to the extent they have assumed  
22 jurisdiction over Tract D pursuant to retrocession." (ECF No. 10 at p. 10). The  
23 argument is that because Tract D was never within the Yakama Reservation, the  
24 federal government never conferred any jurisdiction upon the State pursuant to  
25 Public Law 280 and therefore, there is now no jurisdiction which can be  
26 retroceded with regard to Tract D. This is a valid argument if Tract D is not part

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1 of the Reservation, but that is a question which was not resolved by the  
2 retrocession, did not need to be resolved by it, and remains unresolved. The  
3 federal government did not “assume jurisdiction over Tract D pursuant to  
4 retrocession.” It either already had it because Tract D is within the Reservation, or  
5 it never had it and still does not have it because Tract D is not within the  
6 Reservation.

7 As required by Executive Order No.11435, DOI specified the jurisdiction  
8 retroceded by the State and the effective date of retrocession. In a Federal  
9 Register notice, DOI identified the jurisdiction as “partial civil and criminal  
10 jurisdiction over the Yakama Nation which was acquired by the State of  
11 Washington, under Public Law 83-280, 67 Stat. 588, codified as amended at 18  
12 U.S.C. 1162, 28 U.S.C. 1360,” with reference to the Governor’s Proclamation 14-  
13 01. 80 Fed. Reg. 63,583 (Oct. 20, 2015). (ECF No. 1-6). The particular areas of  
14 civil and criminal jurisdiction were set forth in the proclamation (ECF No. 1-3)  
15 and that is what DOI accepted (ECF Nos. 1-5). Beyond the obvious need for  
16 identifying the Reservation to which the retrocession pertains, Executive Order  
17 No. 11435 does not require DOI to provide a metes and bounds description of  
18 Reservation boundaries. Accordingly, DOI was not required, as part of its  
19 acceptance of the retrocession, to specify whether Tract D lies within Yakima  
20 Reservation boundaries. Such specification was not essential to the validity of the  
21 partial retrocession accepted by DOI.

22 “[C]onsiderable weight [is] accorded to [a federal] executive department’s  
23 construction of a statutory scheme it is entrusted to administer . . . .” *United States*  
24 *v. Mead Corporation*, 533 U.S. 218, 227-28, 121 S.Ct. 2164 (2001). DOI offers  
25 persuasive arguments that its interpretation of the requirements of Executive Order  
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1 No. 11435 (issued pursuant to 25 U.S.C. § 1323(a)) is sensible because: 1)  
2 defining a reservation with metes and bounds description threatens to entangle the  
3 acceptance of retrocessions with reservation boundary disputes; and 2) simply  
4 identifying by name the reservation subject to retrocession means the scope of  
5 retrocession can expand or contract with subsequent judicial decisions or other  
6 events affecting the boundaries of the reservation.

7 Plaintiff's Complaint does not allege a "legally cognizable basis" that DOI  
8 acted "arbitrarily and capriciously" by failing to specify whether Tract D lies  
9 within the exterior boundaries of the Yakama Reservation. While the court is  
10 sympathetic to Plaintiff's concern about jurisdictional uncertainty regarding  
11 ownership of Tract D, this is an uncertainty that existed before retrocession and  
12 continues to exist thereafter. It will have to be resolved if and when federal  
13 jurisdiction is in fact sought to be exercised within Tract D.

### 14 15 **III. CONCLUSION**

16 By proceeding on the legal theory that 25 U.S.C. § 1323 and Executive  
17 Order No. 11435 require DOI to specify the geographic scope of the jurisdiction  
18 retroceded, more specifically, whether DOI intends to exercise jurisdiction in  
19 Tract D because it considers Tract D to be part of the Yakama Reservation,  
20 Plaintiff fails to allege a cognizable legal theory upon which relief can be granted.  
21 Accordingly, Defendants' Motion To Dismiss (ECF No. 9) is **GRANTED** and  
22 Plaintiff's Complaint is **DISMISSED** with prejudice.

23 The District Executive is directed to enter Judgment accordingly and to  
24 forward copies of this order and the Judgment to counsel of record. The file shall  
25 be **CLOSED**.

26 ///

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**IT IS SO ORDERED.** The District Executive is directed to enter this order and forward copies to counsel.

**DATED** this 1st day of September, 2016.

*s/Lonny R. Suko*

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LONNY R. SUKO  
Senior United States District Judge